No. 10056-1

SUPREME COURT
OF THE STATE OF WASHINGTON

Patrick Kelley, an individual,
Petitioner,

v.

The Boeing Company, a Delaware corporation;
Brian Baird, an individual,
Respondents.

OPPOSITION TO PETITION FOR REVIEW

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INTRODUCTION

The petition for review, pretty much from start to finish, engages in extreme rhetorical exaggeration and mischaracterization of this case. The Court of Appeals had to wend its way through similar labyrinthine legal and factual distortions. It correctly viewed them as leading nowhere and disposed of this case in an unpublished opinion, though it devoted numerous lengthy footnotes in an attempt to show attention to all of Kelley's contentions. This Court need not repeat the maze-run. There is no conflict with any decision of this Court or the Court of Appeals and no issue of public importance warranting further review.

Contrary to Kelley's contending that he was participating in an investigation regarding corporate wrongdoing with respect to "wages," here are the basic facts. Petitioner Kelley was a senior Boeing executive. He himself was investigated for his poor treatment of two subordinates. A review committee looked at the evidence, which included Kelley's dishonesty in the investigation, and terminated Kelley. Kelley then sued asserting that the real, nefarious reason he was fired was for having engaged in protected conduct. That conduct—which was completely unrelated

to what the review committee looked at—was solely that Kelley e-mailed a Boeing vice president to say that two of Kelley's subordinate executives were upset with their annual performance scores and corresponding discretionary bonuses, and that Kelley answered a few informal questions about it from HR. That's it. The purported "whistleblowing" literally involved advocating that one executive should have received an annual, discretionary bonus of roughly $65,000 instead of $54,000 (and the other $54,000 instead of $43,000).

There is no case from this Court or the Court of Appeals that finds that kind of upper-management, corporate squabbling over performance ratings and executive bonuses protected conduct for purposes of the tort of wrongful discharge in violation of public policy. The tort requires a "clear mandate of public policy," typically demonstrated through violation of a statute or regulation. Kelley tried all kinds of ways to call his conduct "whistleblowing" about violation of "wage" laws, but those arguments are factually and legally baseless, as the Court of Appeals correctly concluded. The issues here cannot be jackhammered into statutes aimed at failure to pay minimum wages or overtime.

With no conflict among cases and, properly understood, a narrow issue regarding discretionary bonuses for executives, there is no basis for review. The petition should be denied.

ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals correctly concluded that Kelley's criticism of the performance scores and discretionary bonuses received by two executives does not qualify as protected conduct for the tort of discharge in violation of public policy because there is no clear policy mandate regarding that conduct.

STATEMENT OF THE CASE

A. Factual background

Patrick Kelley was a senior Boeing executive who was discharged for threatening two subordinates and retaliating against one of them. Both subordinates made complaints to the Boeing Ethics and Business Conduct Department (Ethics), which initiated investigations against Kelley in response and found the complaints to be substantiated.

The first complaint involved Kelley threatening and retaliating against an analyst who used to work right outside Kelley's

office. She saw a non-employee taking photos in Kelley's office and reported it to Ethics since that violates Boeing policy. After Kelley found out about her report, he called her into his office and berated her: he said her career would be damaged if she ever reported anything to Ethics again. He said he did not trust her because of her Ethics report, and that he did not want her sitting outside his office. Her desk was moved and her job assignment was changed, which diminished her opportunities for promotion. After an initial investigation and subsequent follow-up to resolve credibility questions, an investigator found that the analyst's complaints about Kelley's threatening and retaliatory behavior were substantiated. Slip Op. 1-2, 4.

The second complaint against Kelley involved his threatening to repatriate a manager working abroad unless the manager cancelled a family vacation to address a work issue. A different investigator interviewed both Kelley and the manager and reviewed phone and e-mail records. Kelley said his repatriation threat was unrelated to the manager's planned vacation. The investigator did not find Kelley credible and reported that Kelley

had denied having a phone call with the manager when in fact phone records showed that he did. Slip Op. 3-4.

Boeing convened an Employee Corrective Action Review Board (ECARB) to consider the two investigators' findings and decide on corrective action. The ECARB had five members, all senior executives. Both investigators told the ECARB that Kelley had not been fully honest during the investigation process. The ECARB unanimously decided to discharge Kelley based on his multiple substantiated violations of Boeing policy and his lack of honesty during the investigations. The ECARB members averred that their decision was based solely on those factors, and nothing else. Slip Op. 4.

Kelley elides responsibility and says that the investigations into his threatening and retaliatory behavior and the ECARB decision were all pretext. In broad conspiratorial brushes, he says that the true reason he was fired was because he advocated for higher performance scores and thereby higher discretionary bonuses for two executives he oversaw in an annual review Pet. 8.

Boeing's review process for executives centers around Integrated Performance Scores (IPS), which are inherently

discretionary. IPSs are used to determine the distribution of executive bonuses from a fixed pool of resources and are balanced across peer groups by senior management. While Kelley set tentative IPSs for the executives he managed, those scores were later lowered by Respondent Brian Baird and four other vice presidents because the statements of work for Kelley's executives were not as complex or critical to the organization as those of other executives. Kelley's executives were slated for layoff in part for this same reason. Kelley's executives complained to Baird and the Boeing CEO that their scores should have been higher based on their performance, but they did not allege any unlawful motive. Slip Op. 2.

Kelley had vanishingly few—only two—points of activity related to the executive performance scores and discretionary bonuses that he thought should have been higher. First, he e-mailed Baird to say he was upset that his tentative scores had been changed by higher ups—but admitted that such changes are common. Slip Op. 10 & 11 n.7. And second, Kelley spoke briefly with an investigator looking into a concern from one of the executives who received a lower score and discretionary bonus than

the executive would have liked. Slip Op. 3. Kelley never said that anyone did anything unlawful.

B. Procedural background

After the ECARB decided to discharge Kelley based on the investigations substantiating his inappropriate threats and workplace retaliation, Kelley sued Boeing and Baird in superior court. Respondents removed based on diversity jurisdiction, arguing that Baird was a sham defendant, and moved to dismiss. The federal court ruled that it did not have jurisdiction and remanded the case. *Kelley v. Boeing Co.*, No. 2:18-CV-01808, 2019 WL 4139277, at *4 (W.D. Wash. Aug. 30, 2019). Respondents then filed a motion to dismiss in superior court, which was denied.

Contrary to Kelley's arguments, that denial and the remand simply stated the unremarkable fact that Kelley *could potentially* state a wrongful discharge claim *if* wage laws had been violated and he was retaliated against as a whistleblower about those violations, as he alleged. But those rulings in no way validated his theories sufficient to survive summary judgment. The remand and ruling on the motion to dismiss were, of course, based solely on the allegations in Kelley's complaint, which grossly

exaggerated the legal and factual basis for his "wage"-based "whistleblower" theories. Discovery thoroughly exposed those exaggerations, which were then rightly rejected at summary judgment after Kelley conceded that the sole basis for his suit was his disagreement with executives' discretionary bonuses.

The Court of Appeals affirmed. It held that the challenged conduct did not violate a clear mandate of public policy under any of the six code chapters upon which Kelley relied. Slip Op. 8-13. Kelley's petition for review cites only three of those. The Court of Appeals' reasoning on those three is summarized here:

LAW CITED	**WHAT IT PROTECTS**	**WHY COURT OF APPEALS SAID NOT APPLICABLE**
Ch. 49.12 RCW	***Industrial Welfare****:* DLI investigations and proceedings.	*Slip Op. 8-9*: No DLI investigation or proceeding here.
Ch. 49.32 RCW	***Injunctions in Labor Disputes***: collective bargaining and concerted activity related to terms and conditions of employment, but not managerial behavior.	*Slip Op. 9-11*: Only managerial behavior—which is not covered by the statute—was at issue since the employee ratings Kelley spoke out about pertain more to running a business than the terms and conditions of employment.

Ch. 49.46 RCW	***Minimum Wage Act**:* employees who assert wage claims, including claims about contractual bonuses.	*Slip Op. 11-12*: Kelley did not support argument that chapter protects managers complaining on behalf of employees, and bonuses amounts at issue were discretionary, not contractual. ***Id. at 12 n.8*: Did "not foreclose the possibility that this chapter could protect third-party wage complaints or discretionary bonuses in some situations."

ARGUMENT

Kelley's petition does not meet any of the grounds for review under RAP 13.4(b). He only argues—unsuccessfully—that there is a conflict with two Supreme Court cases and one federal case, and that the issues are of substantial public importance.[1]

I. The Court of Appeals followed the settled standards from this Court for claims of wrongful discharge in violation of public policy.

Washington recognizes the tort of wrongful discharge in violation of public policy generally only in four limited scenarios:

[1] Kelley cites RAP 4.2(a)(3)-(4), which only pertains to direct review of Superior Court decisions. Pet. 10. In any event, RAP 4.2(a)(3)-(4) align with RAP 13.4(b)(1) and (4).

"(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing." *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258-59, 359 P.3d 746 (2015). Kelley bases his wrongful discharge claim on (3) and (4), neither of which has merit here. To bring a successful claim under either, he must (A) identify a clear mandate of public policy that may have been violated, and (B) "produc[e] evidence that the public-policy-linked conduct" was a "significant factor in the decision to discharge" him. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 725, 425 P.3d 837 (2018) (cleaned up).

As the Court of Appeals affirmed, Kelley's claim fails at the threshold: he does not identify any clear policy mandate that his purported protected activity was furthering such that it would be contrary to public policy if he were fired for it. "The question of what constitutes a clear mandate of public policy is one of law and can be established by prior judicial decisions or

constitutional, statutory, or regulatory provisions or schemes." *Id.* (cleaned up). Courts "may not sua sponte manufacture public policy." *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 309-10, 358 P.3d 1153 (2015).

Following that standard, the Court of Appeals reviewed the sources of law that Kelley offered to show a "clear mandate of public policy." As reflected in the table earlier summarizing the decision, the wage and labor statutes Kelley cited simply do not apply to the circumstances of his criticism of annual discretionary bonuses for executives. Those statutes are aimed at violation and enforcement of statutory wage and hour laws. Kelley offers no case saying otherwise, nor does he offer any case remotely holding that circumstances like his are or should be covered by the tort of wrongful discharge in violation of public policy.

II. The cases Kelley cites as presenting a conflict are easily distinguishable.

Kelley's petition discusses only two Supreme Court cases: *Karstetter v. King Cnty. Corr. Guild*, 193 Wn.2d 672, 444 P.3d 1185 (2019), and *Briggs v. Nova Servs.*, 166 Wn.2d 794, 213

P.3d 910 (2009). Neither conflicts with the decision below, nor does the one federal case he cites.

A. The Court of Appeals decision does not conflict with *Karstetter*.

Karstetter concerned the termination of an in-house attorney who had been told to cooperate with a King County ombudsman investigation of improper parking reimbursements. 193 Wn.2d at 676-77. It is easily distinguishable because it involved an investigation of alleged law-breaking, unlike Kelley's situation which involved purely intra-corporate discretionary decisions regarding bonuses. Some kind of actual law-breaking is nearly always required for whistle-blower protection. *Id.* at 684-85. The only exception is imminent harm cases, which this is not. *See, e.g.*, *Ellis v. City of Seattle*, 142 Wn.2d 450, 461, 13 P.3d 1065 (2000) (claim involving emergency alarm). Indeed, even if Kelley had a good faith or "objectively reasonable" but mistaken belief that a policy or law was violated, that is not enough. *Id.*; *see also Martin*, 191 Wn.2d at 725 (no wrongful discharge where no court decision, statute, or regulation required basketball court wall padding to protect student safety, which plaintiff said was

necessary); *Bott v. Rockwell Int'l*, 80 Wn. App. 326, 335-36, 908 P.2d 909 (1996) (discussing proposed good faith standard).

Karstetter was a motion to dismiss decision and highlighted the liberal notice-pleading standards at that stage. 193 Wn.2d 685-86. Kelley argues as if he should benefit from similar notice-pleading assumptions, including by his emphasis that a motion to dismiss was denied below. Pet. 9, 15. At summary judgment, though, the motion-to-dismiss standard is gone, and Kelley must come forward with evidence to support the legal elements of his claims. Mere recitation of legal conclusions or pleaded promises of sufficient facts is not enough. Kelley never presented evidence at summary judgment that could show any underlying violation of the law or relevant public policy in the Title 49 provisions he cites. *See* Slip Op. 8-13. And that is why summary judgment was proper. His complaint said he could do that, but he never came forward with evidence of what his complaint promised.

B. The Court of Appeals decision does not conflict with *Briggs*.

Kelley disagrees with this Court's holding in *Briggs v. Nova Services*, but his petition does not actually argue that *Briggs* conflicts with the decision below. Pet. 15-17. It does not.

Briggs involved managers who sought to get their supervisor fired for actions they did not like—including allegedly not hiring enough staff, managing finances poorly, and not fostering open communication—but after a board reviewed the managers' conduct, they were fired instead. This Court concluded that the fired managers could not sustain a wrongful discharge claim because their conduct was not in furtherance of a clear mandate of public policy. In particular, their actions were not protected collective efforts regarding the "terms and conditions of employment" under RCW 49.32.020, but rather concerned "managerial decisions." 166 Wn.2d 804.

The Court of Appeals here quite sensibly placed Kelley's criticism of executive bonus determinations in the "managerial decision" bucket as well. Indeed, Kelley's criticism stands in stark contrast to protected organization around terms and conditions of employment like improved medical coverage, lunch and

rest breaks, and food prices at in-plant dining rooms. *Id.* Kelley misreads the Court of Appeals decision as focusing on his *status* as a manager, Pet. 17, when instead it rightly forecloses his action because of the managerial nature of the *actions* he took, based on settled case law discussed in *Briggs*. 166 Wn.2d at 803-04 (citing U.S. Supreme Court cases).

C. The Court of Appeals decision does not conflict with federal case law.

Beyond Kelley's scant discussion of Washington cases, he wrongly asserts that the unpublished Court of Appeals decision could "reopen[] a [federal] circuit split" regarding informal employee complaints. Pet. 13. This is incorrect as a matter of law and not a ground for review under RAP 13.4(b). Kelley references a now-settled federal circuit split about "whether an informal, oral complaint regarding the Fair Labor Standards Act [FLSA] triggered protection from retaliation." Pet. 13 (citing *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 6, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011)). *Kasten* held that it did. It is irrelevant here for many reasons, but principally the following two.

First, stating the obvious, an unpublished Washington Court of Appeals decision has no precedential effect on federal courts—or even Washington courts, *see* GR 14.1—and in no way undermines the U.S. Supreme Court's final word.

Second, Kelley's citation of *Kasten* is just another misguided attempt to portray his circumstances as similar to complaints tied to statutory wage and hours laws. In *Kasten*, the plaintiff complained that his employer had violated FLSA donning and doffing provisions. 563 U.S. at 5. But as already discussed, nowhere in Kelley's purportedly protected communications did he allege that Respondents violated any law.

III. This case does not raise issues of substantial public importance that should be determined by this Court.

Kelley's situation is nowhere close to the kinds of cases in which this Court has recognized wrongful discharge. For example, an employee could not be fired for leaving a company's armored car to aid someone being chased by an assailant with a knife. *See Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996). Similarly, an employee could not be fired for

missing work to protect children from domestic violence. *See Danny v. Laidlaw Transit*, 165 Wn.2d 200, 193 P.3d 128 (2008).

On the other hand, there was no wrongful discharge where an employee was fired for releasing sensitive information when she did not agree with the employer's use of the information. *See Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989). Nor was any public policy mandate implicated when a university employee said he was fired for advocating for basketball court wall padding to protect student safety. *See Martin*, 191 Wn.2d 712. Because there was "no court decision, statute, or regulation" requiring what the employees in *Dicomes* and *Martin* were asking for, their "mere opinion" that their employer should have provided it "d[id] not constitute a clear mandate of public policy." *Id.* at 725. So too here.

Whether Boeing leaders properly valued the contributions of some executives over others; whether the performance rating process differed from previous years; and even whether an executive gave conflicting answers about why someone received less of a bonus than they expected, Pet. 3-6—*none* of those "strike[s] at the heart of a citizen's social rights, duties, and

responsibilities." *Id.* There is simply no legal basis for placing Kelley's quibbles about discretionary executive bonuses in the category of foremost Washington public policy.

Beyond Kelley's discussion of chapter 49.32 RCW under *Briggs*, *see supra* II.B, he suggests only two other areas of purported public importance based on chapters 49.12 and 49.46 RCW. Neither have merit.

Ch. 49.12 RCW: Kelley mischaracterizes the unpublished decision below as establishing that chapter 49.12 RCW cannot be the basis for a wrongful discharge claim unless a DLI investigation or proceeding is at issue. Pet. 11. The decision below does not *establish* this—it simply applies the law to the facts, since the Code's unambiguous text already confirms this. *See* RCW 49.12.010, .033; 43.22.270(4); *see also* GR 14.1. The unpublished Court of Appeals decision thus will not "carry undue weight" in taking public policy in any "direction" at all. Pet. 11. That direction is already set by statute.

To the extent Kelley suggests that 49.12.130 RCW applies because he "may testify" in a DLI investigation or proceeding, Pet. 10, there is no fact signaling that he might. Slip Op. 2-4. The

statute would lose meaning if it were read to existentially assume that everyone "may" someday testify before the DLI, without any actual whiff of that on the horizon.[2]

Ch. 49.46 RCW: Kelley mischaracterizes the decision below as precluding protection under chapter 49.46 RCW for all managers who speak out on behalf of subordinates. Pet. 12, 14. But the decision below only purports to rule against Kelley based on the facts of *his* case. Slip Op. 12. It expressly states that it "do[es] not foreclose the possibility that this chapter could protect third-party wage complaints or discretionary bonuses in some situations." *Id.* at 12 n.8.

CONCLUSION

This Court should deny the petition and Kelley's invitation to "manufacture public policy" where none has been "previously manifested in the constitution, a statute, or a prior court decision." *Rickman*, 184 Wn.2d at 309-10.

[2] Kelley makes this same suggestion about potential future testimony under RCW 49.46.100(2), Pet. 12, which likewise fails.

CERTIFICATE OF COMPLIANCE

I certify that the number of words in this Answer to Petition for Review is 3,428.

DATED: February 11, 2022

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CERTIFICATE OF SERVICE

On February 11, 2022, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document:

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I certify under penalty of perjury under the laws of the State of Alaska that the foregoing is true and correct.

DATED: February 11, 2022, at Anchorage, AK.

s/ Samantha Reardon
Samantha Reardon
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PERKINS COIE LLP

February 11, 2022 - 11:54 AM

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